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Out for Blood: The Expansion of Exigent Circumstances and Erosion of the Fourth Amendment

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NOTE

Out for Blood: The Expansion of Exigent Circumstances and Erosion of the Fourth Amendment

Mitchell v. Wisconsin, 139 S. Ct. 2525 (2019).

Tyler M. Ludwig[*]

I. INTRODUCTION

The Fourth Amendment of the United States Constitution requires police officers to obtain a warrant before conducting a search of an individual.[1] However, doing so is not always possible, and courts have created exceptions to this requirement in order to deal with pragmatic limitations.[2] The need for these exceptions has often been presented to the United States Supreme Court in the context of obtaining blood alcohol concentration ("BAC") tests from drivers suspected of driving under the influence.[3] In *Mitchell v. Wisconsin*, the Supreme Court dealt with a new problem in this area: drawing blood from a suspected drunk driver who was unconscious.[4] The Court ruled that in virtually all such instances, police may permissibly order a blood draw without first obtaining a warrant.[5] The Court reasoned that such situations generally fall within the exigent circumstances exception to the Fourth Amendment warrant requirement, which allows for warrantless searches to prevent the imminent destruction of evidence.[6]

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1. U.S. CONST. amend. IV.

2. *See* Michigan v. Tyler, 436 U.S. 499, 504–05 (1978); Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973); Chimel v. California, 395 U.S. 752, 761 (1969).

3. *See* Birchfield v. North Dakota, 136 S. Ct. 2160, 2163 (2016); Missouri v. McNeely, 569 U.S. 141 (2013); Schmerber v. California, 384 U.S. 757, 769–70 (1966).

4. Mitchell v. Wisconsin, 139 S. Ct. 2525, 2531 (2019).

5. *Id.*

6. *Id.*

Part IV of this Note examines the reasoning used by the Supreme Court in reaching this decision and argues that the Court was incorrect in its holding. Part V of this Note argues the Court should have relied on the particular facts of each case in deciding where an exigency exists rather than creating such a broad rule. Next, Part V argues that the holding erroneously shifts the burden of showing the need for Fourth Amendment warrant exceptions from the police to defendants. Finally, Part V argues that the Court failed to provide guidance for cases that do not fall within the exigency exception.

II. FACTS AND HOLDING

In 2013, Gerald Mitchell was questioned by an officer from the City of Sheboygan Police Department on suspicions of drunk driving.[7] Police were responding to a report from a caller claiming to have seen an intoxicated Mitchell enter a grey van and drive away.[8] Approximately thirty to forty-five minutes after police were dispatched, an officer found Mitchell walking near a beach.[9] When discovered, Mitchell was slurring his speech and had difficulty maintaining balance.[10] Mitchell admitted to the officer that he had been drinking prior to driving and that he had parked his vehicle because he felt too drunk to drive.[11]

The officer chose not to conduct field sobriety tests because he believed it would be unsafe considering Mitchell's condition.[12] A preliminary breath test revealed that Mitchell's BAC was three times the legal limit in Wisconsin.[13] Mitchell was arrested for operating a vehicle while intoxicated.[14] Once Mitchell arrived at the police station, police concluded that his physical condition had deteriorated to the point that an evidentiary breath test would not be feasible.[15]

Police instead transported Mitchell to a nearby hospital to conduct a blood draw.[16] During the drive to the hospital, Mitchell "appeared to be completely incapacitated, [and] would not wake up with any type of

7. State v. Mitchell, 914 N.W.2d 151, 154, *cert. granted*, 139 S. Ct. 915 (2019), and *vacated and remanded*, 139 S. Ct. 2525 (2019).

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* Congress conditions the award of federal highway funds on a state's establishment of a 0.08BAC limit – every State has adopted this limit. Mitchell v. Wisconsin, 139 S. Ct. 2525, 2536 (2019). While roadside breath tests can be used to establish probable cause, police must generally administer a more reliable breath test using "evidence-grade" machinery once the motorist is transported to the police station. Birchfield v. North Dakota, 136 S. Ct. 2160, 2191–92 (2016).

14. *Mitchell*, 914 N.W.2d at 154.

15. *Id.* at 155.

16. *Id.*

stimulation."[17] At the hospital, Mitchell needed to be transported in a wheelchair, and he was unable to maintain an upright position in the chair.[18] The officer notified Mitchell of his statutory right to withdraw his consent for the blood draw, but Mitchell was too incapacitated to answer.[19] At the officer's direction, the hospital staff drew a sample of Mitchell's blood while he remained unconscious.[20] A test of the blood indicated that Mitchell had a BAC of 0.222, almost three times Wisconsin's legal limit of 0.08.[21]

Mitchell was charged with driving with a prohibited alcohol concentration ("PAC"), as well as operating a motor vehicle while intoxicated ("OWI").[22] In a pretrial motion, Mitchell moved to suppress the results of the blood test, alleging that the blood draw constituted a warrantless search in violation of the Fourth Amendment.[23] In response, the State claimed that Mitchell had obviated the need for a warrant by consenting to the blood draw. The State argued that, under Wisconsin's implied-consent law, Mitchell implicitly consented to having his blood drawn by driving his van on a Wisconsin public road.[24] Further, the State argued that Mitchell was presumed not to have withdrawn his consent under the law.[25] The State expressly declined to rely on the exigent circumstances exception to the Fourth Amendment warrant requirement, explaining that "[t]here is nothing to suggest that this is a blood draw on [an] exigent circumstances situation when there has been a concern for exigency."[26] The trial court denied Mitchell's motion to suppress, concluding that the officer had probable cause to believe that Mitchell was driving while intoxicated, and thus, the blood draw was lawful.[27] Mitchell was found guilty by a jury and subsequently convicted.[28] Mitchell appealed the verdict, contending that the warrantless

17. *Id.*

18. *Id.*

19. *Id.* Wisconsin's implied consent statute states that any person operating a motor vehicle on public roads is deemed to have consented to a blood test for the purpose of determining their BAC whenever a law enforcement officer detects a presence of alcohol. WIS. STAT. ANN. § 343.305(2), (3)(a)(m) (2019).

20. *Mitchell*, 914 N.W.2d at 155.

21. *Id.*; WIS. STAT. ANN. § 346.63(2m) (2019).

22. *Mitchell*, 914 N.W.2d at 155.

23. *Id.*

24. *Id.* Under the Wisconsin implied consent statute, any person operating a vehicle on a public road is deemed to have consented to undergoing a blood test when arrested for operating a motor vehicle while impaired. WIS. STAT. ANN. § 343.305(3) (2019).

25. *Mitchell*, 914 N.W.2d at 155. Under the Wisconsin implied consent statute, a person who is unconscious and unable to withdraw consent is presumed to have not withdrawn consent. WIS. STAT. ANN. § 343.305(3)(b) (2019).

26. State v. Mitchell, 2017 WL 9803322 at *2.

27. *Mitchell*, 914 N.W.2d at 155.

28. *Id.*

blood draw was a violation of his Fourth Amendment right to be free from "unreasonable searches and seizures."[29]

The Wisconsin Court of Appeals certified two questions for the Supreme Court of Wisconsin: (1) whether "implied consent" arising through driving a vehicle on public roadways is constitutionally sufficient consent, and (2) whether a warrantless blood draw from an unconscious person as prescribed by the Wisconsin statute violates the Fourth Amendment.[30] The Supreme Court of Wisconsin upheld Mitchell's convictions.[31] The majority held that Mitchell's voluntary conduct of driving on Wisconsin roads after consuming enough alcohol to evidence probable cause was enough to constitute voluntary consent, and thus, the blood draw was permissible under the Fourth Amendment.[32] In a concurring opinion, Justice Kelly argued that the blood draw was permissible not on the grounds of consenting to a search, but instead under the Fourth Amendment exigent circumstances exception.[33] In a dissenting opinion, Justice Bradley argued that implied consent laws could not be used to establish voluntary consent.[34]

The United States Supreme Court granted Mitchell's petition for writ of certiorari to review the decision reached by the Supreme Court of Wisconsin.[35] On appeal, the Court considered the issue of whether an officer can order a blood draw without the use of a warrant.[36] In a plurality decision, the Court ruled that Mitchell's blood draw was permissible under the exigent circumstances doctrine unless Mitchell could prove on remand that his blood would not have been drawn absent the BAC investigation and that police could not have reasonably believed seeking a warrant would interfere with other pressing duties.[37]

III. LEGAL BACKGROUND

Since 1906, state governments have attempted to deal with the public safety concerns involving drunk driving by imposing criminal penalties.[38] In the years following the end of prohibition, the American Medical Association and the National Safety Council established committees to study the issue of drunk driving. Both committees concluded that a driver with a BAC of 0.15 or higher could be presumed inebriated.[39] States began adopting laws

29. *Id.*
30. *Id.* at 155–56.
31. *Id.* at 167.
32. *Id.*
33. *See id.* at 169 (Kelly, J., concurring).
34. *Id.* at 172 (Bradley, J., dissenting).
35. Mitchell v. Wisconsin, 139 S. Ct. 2525 (2019).
36. *Id.* at 2530–31.
37. *Id.* at 2539.
38. Birchfield v. North Dakota, 136 S. Ct. 2160, 2167 (2016) (citing J. Jacobs, *Drunk Driving: An American Dilemma* 57 (1989)).
39. *Id.* (same).

presuming intoxication based on this standard before moving towards adoption of laws making driving with BAC levels of .10 or higher *per se* illegal.[40] In 1992, the National Highway Traffic Safety Administration of the United States Department of Transportation recommended to Congress that all states set a BAC limit of .08 for all drunk driving offenses. [41] Since Congress made the award of federal highway funds conditional on states adopting this limit, all states have done so.[42]

As a mechanism for enforcing BAC limits, all fifty states as well as the District of Columbia have adopted "implied consent" laws for motorists.[43] While the laws vary slightly from state to state, the basic rule is that a person operating a vehicle on a public roadway is deemed to have impliedly consented to a chemical BAC test upon arrest for the commission of any offense while driving under the influence of alcohol.[44] Such tests often consist of analyzing a driver's breath or blood sample.[45] When asked to submit to a BAC test, the driver has the opportunity to "withdraw" his or her consent and refuse the test, but the driver will face penalties for doing so.[46] In the past, states have assigned criminal penalties for refusing to submit to *any* type of BAC test. However, states may now impose criminal penalties for refusing to submit to breath tests *but not* blood tests.[47] A state does have the right to suspend an individual's driver's license for refusing to submit to any type of test, and the individual's refusal may be admitted as evidence against him or her in a criminal proceeding.[48] The statutes generally contain a provision calling for police to issue a verbal warning informing the arrested individual of his or her rights under the implied consent law.[49] Additionally, the statutes ordinarily provide that if the driver is unconscious or otherwise incapacitated at the time police wish to obtain a blood sample, the driver is deemed not to have withdrawn consent.[50] Wisconsin's implied consent statute contains all of these provisions.[51]

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40. *Id.* (same).

41. Kimberly S. Keller, *Sobering Up Daubert: Recent Issues Arising in Alcohol-Related Expert Testimony*, 46 S. TEX. L. REV. 111, 135 (2004).

42. *Mitchell*, 139 S. Ct. at 2536.

43. *Id.* at 2531.

44. Adam Ferrell, *Rodriguez v. State: Addressing Georgia's Implied Consent Requirements for Non-English-Speaking Drivers*, 54 MERCER L. REV. 1253, 1255 (2003).

45. Ferrell, *supra* note 44, at 1255.

46. Ferrell, *supra* note 444, at 1255.

47. Simon Bord, *Drunk Driving, Blood, and Breath: The Impact of Birchfield v. North Dakota*, 27 CORNELL J.L. & PUB. POL'Y 841, 856 (2018).

48. South Dakota Dakota v. Neville, 459 U.S. 553, 566 (1983); Mackey v. Montrym, 443 U.S. 1, 19 (1979).

49. Ferrell, *supra* note 44 at 1256.

50. 72 A.L.R.3d 325 (Originally published in 1976).

51. WIS. STAT. ANN. § 343.305 (2019).

Enforcing BAC limits requires police to investigate suspects and collect evidence against them, subject to the limits of the Fourth Amendment. The Fourth Amendment prohibits unreasonable searches and seizures by the government. Per that prohibition, the government is generally required to obtain a warrant justified by probable cause from a neutral judge or magistrate in order to conduct searches.[52] The Supreme Court has said "[T]he most basic constitutional rule in this area is that searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well delineated exceptions."[53] Over time, such exceptions have been established for various sets of circumstances where obtaining a warrant would be needless or unduly burdensome.[54]

The warrant exceptions for voluntary consent, search incident to lawful arrest, and exigent circumstances have all been relevant to drunk driving cases.[55] On multiple occasions, the United States Supreme Court has specifically addressed how these exceptions apply to the collection of BAC evidence.[56]

A. Voluntary Consent

The United States Supreme Court first acknowledged in 1946 that a warrantless search could be valid based on an individual's consent, noting that the rights provided by the Fourth Amendment protecting against warrantless searches and seizures may be waived.[57] Two decades later, the Court refined this concept, noting that the State has the burden of showing that consent was freely and voluntarily given.[58] In *Schneckloth v. Bustamonte*, the Court began to articulate clear requirements for voluntary consent.[59] The Court weighed the ambiguity of the term voluntary, noting:

> Except where a person is unconscious or drugged or otherwise lacks capacity for conscious choice, all incriminating statements—even those made under brutal treatment—are 'voluntary' in the sense of

52. U.S. CONST. amend. IV.

53. Coolidge v. New Hampshire, 403 U.S. 443, 454–55 (1971), *holding modified by* Horton v. California, 496 U.S. 128 (1990).

54. Amy B. Beller, *United States v. Macdonald: The Exigent Circumstances Exception and the Erosion of the Fourth Amendment*, 20 HOFSTRA L. REV. 407 (1991).

55. *See* Birchfield v. North Dakota, 136 S. Ct. 2160, 2163 (2016); Missouri v. McNeely, 569 U.S. 141 (2013); Schmerber v. California, 384 U.S. 757, 769–70 (1966).

56. *See* Birchfield v. North Dakota, 136 S. Ct. 2160, 2163 (2016); Missouri v. McNeely, 569 U.S. 141 (2013); Schmerber v. California, 384 U.S. 757, 769–70 (1966).

57. Zap v. United States, 328 U.S. 624, 628 (1946), *vacated*, 330 U.S. 800 (1947).

58. Bumper v. North Carolina, 391 U.S. 543, 548 (1968).

59. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 223–27 (1973).

> representing a choice of alternatives. On the other hand, if 'voluntariness' incorporates notions of 'butfor' cause, the question should be whether the statement would have been made even absent inquiry or other official action. Under such a test, virtually no statement would be voluntary because very few people give incriminating statements in the absence of official action of some kind.[60]

The Court concluded that voluntariness should be determined by deciding whether the search was the product of duress or coercion – express or implied – based on the totality of the circumstances.[61] The Court further elaborated that while knowledge of one's right to refuse is a factor to be considered in this analysis, it is not the *sine qua non* of an effective voluntary consent.[62] The "totality of the circumstances test" relies heavily on the particular factual situation of each case, rather than a specific set of judicially-prescribed factors.[63] Prior to *Mitchell*, the Supreme Court had never been tasked with determining whether implied consent statutes could create voluntary consent for the purpose of BAC tests.[64]

B. Searches Incident to Lawful Arrest

The doctrine of search incident to lawful arrest was first referenced by the Supreme Court in 1914 as dictum, noting a "right on the part of the government always recognized under English and American law, to search the person of the accused when legally arrested, to discover and seize the fruits or evidences of crime."[65] Throughout the early to mid-twentieth century, the Court handled numerous cases in which it tried to establish a clearer standard for this doctrine.[66] Finally, in *Chimel v. California*, the Court articulated that it is reasonable for an officer to search a lawfully arrested person without first obtaining a warrant in order to remove any weapons the individual might use or to prevent the concealment or destruction of evidence.[67] The Supreme Court has discussed this doctrine in the context of persons arrested for driving under the influence.[68]

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60. *Id.* at 224.

61. *Id.* at 225–26.

62. *Id.* at 226. *Sine qua non* means essential condition.

63. 26 Am. Jur. Proof of Facts 2d 465 (Originally published in 1981).

64. *See* Mitchell v. Wisconsin, 139 S. Ct. 2525 (2019).

65. Weeks v. United States, 232 U.S. 383, 392 (1914), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961), and *overruled in part by* Elkins v. United States, 364 U.S. 206 (1960).

66. *See* Chimel v. California, 395 U.S. 752, 755–60 (1969).

67. *Id.* at 763.

68. *See* Birchfield v. North Dakota, 136 S. Ct. 2160, 2184 (2016); *see also* Schmerber v. California, 384 U.S. 757, 769 (1966).

C. Exigent Circumstances

Since 1948, courts have recognized an exception to the warrant requirement in cases of "exigent circumstances."[69] In *Johnson v. United States*, the Supreme Court ruled that "[T]here are exceptional circumstances in which, on balancing the need for effective law enforcement against the right of privacy, it may be contended that a magistrate's warrant for search may be dispensed with."[70] A warrantless search may be legal under this exception when "there is compelling need for official action and no time to secure a warrant."[71] In determining whether an exigency exists, courts have considered several factors, including, among others: the gravity of the offense, a clear showing of probable cause to believe that the suspect committed the crime, the likelihood that a suspect will escape if not swiftly apprehended, and the peaceful circumstances of the entry.[72]

The three main categories of exigencies recognized by courts are: (1) engaging in a "hot pursuit" of a fleeing suspect, (2) protecting a person or the public from an immediate danger, and (3) preventing the imminent destruction of evidence.[73] The Supreme Court has defined the third category as situations "in which police action literally must be 'now or never' to preserve the evidence of the crime."[74] Issues involving the destruction of evidence have been presented in the case of BAC tests because the natural metabolization of alcohol in the bloodstream inherently presents a risk of the destruction of evidence if tests are not obtained promptly.[75]

D. BAC Tests and the Fourth Amendment

Prior to *Mitchell*, the Supreme Court dealt directly with three other Fourth Amendment cases related to BAC tests. The first time was in 1966 in *Schmerber v. California*, where the Court grappled with the issue of whether an officer could draw blood, without first obtaining a warrant, from someone suspected of drunk driving.[76] In that case, Schmerber had been convicted of driving under the influence.[77] Schmerber was receiving hospital treatment for injuries he sustained as the driver in a car accident when he was arrested.[78] Although Schmerber refused to consent to a blood draw, a physician still drew

69. Beller, *supra* note 544.

70. Johnson v. United States, 333 U.S. 10, 14–15 (1948).

71. Michigan v. Tyler, 436 U.S. 499, 509 (1978).

72. United States v. MacDonald, 916 F.2d 766, 769–70 (2d Cir. 1990).

73. Brigham City, Utah v. Stuart, 547 U.S. 398, 403 (2006).

74. Roaden v. Kentucky, 413 U.S. 496, 505 (1973).

75. *See* Birchfield v. North Dakota, 136 S. Ct. 2160, 2163 (2016); Missouri v. McNeely, 569 U.S. 141 (2013); Schmerber v. California, 384 U.S. 757, 769–70 (1966).

76. *Schmerber*, 384 U.S. at 770.

77. *Id.* at 758.

78. *Id.*

his blood at the direction of an officer.[79] On appeal, Schmerber argued that the chemical analysis of his blood used by the State should have been excluded from evidence because it was obtained through an unlawful search and seizure in violation of the Fourth and Fourteenth Amendments.[80]

The Supreme Court found that blood draws plainly fall within the Fourth Amendment's protections against unlawful search and seizures, and that the default should be able to prevent such warrantless searches in circumstances where they are unjustified.[81] The Court noted that while existing case law seemed to indicate an unrestricted right to search a lawfully arrested person, such decisions were not applicable to "searches involving intrusions beyond the body's surface."[82] Ultimately, the majority decided that the natural dissipation of BAC combined with the time lost by taking Schmerber to the hospital and investigating the accident scene could lead a reasonable officer to conclude that delaying the test any further to obtain a warrant would result in the destruction of the BAC evidence.[83] The Court ruled that, in this fact-specific case, ordering the blood draw without first obtaining a warrant was permissible.[84] While the Court did not expressly refer to the exigent circumstances exception, this reasoning falls in line with the "preservation of evidence" exigency exception.[85]

The Supreme Court did not hear another case dealing with BAC tests under the Fourth Amendment until 2013 when it heard *Missouri v. McNeely*, a case again dealing with warrant requirements for blood draws.[86] In that case, McNeely had been pulled over after officers observed him exceeding the speed limit and repeatedly crossing the center line.[87] After McNeely performed poorly on the field sobriety tests and declined to take a breath test, he was placed under arrest.[88] When McNeely indicated that he would again refuse to take a breath test at the police station, the officer took him to a nearby hospital to conduct a blood test without attempting to secure a warrant.[89] At the hospital, the officer asked McNeely if he would consent to a blood test; McNeely refused, and the officer ordered a hospital lab technician to obtain a lab test anyway.[90] When McNeely was tried for driving while intoxicated, the trial court excluded the results of the blood test, finding that they were

79. *Id.* at 758–59.
80. *Id.* at 766.
81. *Id.* at 767–68.
82. *Id.* at 769.
83. *Id.* at 770–71.
84. *Id.*
85. *See* Ker v. California, 374 U.S. 23, 41 (1963).
86. Missouri v. McNeely, 569 U.S. 141, 145 (2013).
87. *Id.*
88. *Id.*
89. *Id.* at 145–46.
90. *Id.*

obtained through an unlawful search in violation of the Fourth Amendment, and that the exigency exception did not apply in this case.[91]

On appeal, the State argued that the natural metabolization of alcohol in the bloodstream presented a *per se* exigency that permits warrantless blood testing in all drunk-driving cases.[92] While the Court acknowledged that the rate of dissipation of alcohol from the bloodstream means significant delays in testing will negatively affect the probative value of its results, it found no reason to "depart from careful case-by-case assessment of exigency and adopt the categorical rule proposed by the State."[93] The Court ruled that while some situations may exist where the threat of dissipation of alcohol from the bloodstream would permit a lawful warrantless search under the exigency exception, each case should be decided on its own facts, and that the Fourth Amendment requires officers to obtain a warrant in situations where doing so will not significantly undermine the efficacy of the blood test.[94] In a dissenting opinion, Justice Thomas argued for adopting the *per se* rule proposed by the State because the natural metabolization of alcohol inevitably destroys evidence and thus itself constitutes an exigency.[95]

The Court once again addressed BAC tests under the Fourth Amendment in 2016 when it heard *Birchfield v. North Dakota*.[96] There, the Court examined three separate cases all concerning whether a state law requiring drivers to submit to BAC tests after being lawfully arrested violated the Fourth Amendment's prohibition against unreasonable searches.[97] In the first case, an officer approached Danny Birchfield after seeing him fail to drive his car out of a ditch in which it was stuck.[98] After performing poorly on several field sobriety tests, Birchfield agreed to take a roadside breath test, which revealed his BAC to be 0.254, more than three times the legal limit.[99] Birchfield was arrested for driving while impaired and informed of his obligation under North Dakota law to undergo further BAC testing, subject to criminal penalties.[100] However, Birchfield refused to allow his blood to be drawn.[101] Birchfield took a conditional guilty plea for the misdemeanor offense of refusal, admitting to refusing the blood test, but arguing the criminalization of his

91. *Id.* at 146.
92. *Id.* at 151–52.
93. *Id.* at 152.
94. *Id.* at 152–53.
95. *Id.* at 176.
96. Birchfield v. North Dakota, 136 S. Ct. 2160 (2016).
97. *Id.* at 2166.
98. *Id.* at 2170.
99. *Id.*
100. *Id.* North Dakota used results from the roadside test "only for determining whether or not a further test should be given. N.D. CENT. CODE. ANN. § 39-20-14(3) (West 2019).
101. *Birchfield*, 136 S. Ct. at 2170.

refusal was a violation of the Fourth Amendment.[102] The district court rejected his argument and sentenced him accordingly.[103]

In the second case, William Robert Bernard, Jr. was questioned by an officer, who believed Bernard had been attempting to drive a truck out of the ditch in which it was stuck.[104] Bernard admitted to drinking, but denied driving the truck, despite holding the keys in his hand.[105] Bernard refused to perform any field sobriety tests or take a roadside breath test.[106] Bernard was charged with refusal, but the district court dismissed the charges on the ground that the warrantless demand for a breath test violated the Fourth Amendment.[107]

In the third case, an officer approached Steve Michael Beylund after observing him nearly hit a stop sign.[108] Believing Beylund to be drunk, the officer arrested him and took him to a nearby hospital.[109] Unlike the others in this case, Beylund consented to a blood draw, which revealed that his BAC was well over the legal limit.[110] When the state suspended his license, Beylund appealed, arguing that his consent had been coerced because the officer told him that refusal to consent would itself constitute a crime, an argument that the district court rejected.[111]

The Supreme Court took up all three cases and consolidated them for argument in order to decide if individuals arrested for drunk driving could be penalized for refusing to take a warrantless test to measure their blood alcohol content.[112] The Court noted that while breath tests do not raise any significant privacy concerns, blood tests are more intrusive.[113] As a result, the Court ruled that breath tests, but not blood tests, may be administered without a warrant pursuant to the search incident to lawful arrest doctrine.[114] Additionally, the Court held that imposing criminal penalties on a driver for refusing a breath test was permissible, but doing so for refusing a blood test was unconstitutional.[115] However, the Court emphasized that nothing in the opinion should "cast doubt" on the legality of imposing *civil* penalties on drivers who refuse blood tests.[116] Again, Justice Thomas wrote a separate opinion, concurring in part and dissenting in part, arguing that warrantless

102. *Id.* at 2170–71.
103. *Id.* at 2171.
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.* at 2185.
115. *Id.* at 2186.
116. *Id.*

BAC tests should always be constitutional under the exigent circumstances exception.[117]

After these three decisions, the case law seemed relatively clear: while the searches incident to lawful arrest exception never permitted warrantless blood draws, the exigent circumstances exception did permit such blood draws in some limited, fact-specific cases.[118] On the other hand, whether implied consent laws were sufficient for creating voluntary consent to warrantless blood draws remained an open question.

IV. INSTANT DECISION

Justice Alito wrote the plurality opinion, joined by Chief Justice Roberts, Justice Breyer, and Justice Kavanaugh. The plurality side-stepped the issue of voluntary consent and instead held that the exigent circumstances exception permits warrantless blood draws from unconscious drivers in almost all cases.[119] Justice Thomas wrote a concurring opinion, arguing that warrantless BAC tests should *always* be permissible under the exigent circumstances exception.[120] Justice Sotomayor wrote a dissenting opinion, joined by Justices Ginsburg and Kagan, arguing that courts should continue to evaluate the appropriateness of the exigent circumstances exception on a case-by-case basis rather than apply a blanket rule for unconscious drivers.[121] Justice Gorsuch wrote a separate dissent, criticizing the plurality for deciding the case upon grounds that were not argued by either of the parties.[122]

A. The Plurality Opinion

The plurality opinion did not clearly rule on whether or not Wisconsin's implied consent statute was sufficient to establish voluntary consent in Mitchell's case.[123] Rather than address the appropriateness of a warrantless blood draw in Mitchell's specific situation, the Court adopted a much broader approach, holding that the exigent-circumstances rule "almost always" permits a blood test without a warrant when the driver is unconscious.[124] It noted that exigency for a warrantless blood draw to prevent the imminent destruction of evidence exists when (1) BAC evidence is dissipating and (2)

117. *Id.* at 2197.

118. *See id.*; Missouri v. McNeely, 569 U.S. 141 (2013); Schmerber v. California, 384 U.S. 757 (1966).

119. Mitchell v. Wisconsin, 139 S. Ct. 2525, 2531 (2019).

120. *Id.* at 2539 (Thomas, J., concurring).

121. *Id.* at 2541.

122. *Id.* at 2551 (Sotomayor, J., dissenting).

123. *See id.* at 2538–39 (plurality opinion). While the United States Supreme Court failed to address this issue in *Mitchell*, a Wisconsin appellate court later ruled that this implied consent statute did not satisfy the consent exception to the Fourth Amendment's warrant requirement. State v. Prado 947 N.W.2d 182, 197-99 (2020).

124. *Id.* at 2531.

another factor creating a pressing health, safety, or law enforcement need that takes priority over obtaining a warrant exists, and that an unconscious driver itself is such a pressing need.[125] In reaching this conclusion, the plurality reasoned that when a driver is unconscious, there is a compelling need for a blood test, and an officer's need to attend to more pressing issues associated with an unconscious driver may leave no time to obtain a warrant.[126] Instead of looking to the facts of Mitchell's case to support this point, the plurality presented an unrelated hypothetical, where an unconscious driver crashes and gives officers "a slew of urgent tasks," such as ensuring other injured persons receive medical care, providing first aid until medical personnel arrive, dealing with fatalities, and redirecting traffic to prevent additional accidents.[127] No such facts were present in this case.

The opinion does leave open an opportunity for some defendants in "unusual case[s]" to prove that their blood would not otherwise have been drawn if police were not seeking BAC evidence and that police could not have reasonably determined that obtaining a warrant would interfere with more pressing needs.[128] The Court remanded the case in order to provide Mitchell with the opportunity to make such a showing.[129]

B. The Concurring Opinion

In Justice Thomas's concurring opinion, he once again argued for a broader *per se* rule always allowing officers to conduct warrantless BAC tests, just as he did in *McNeely* and *Birchfield*.[130] He argued that exigency always exists in these cases because the natural dissipation for BAC creates a risk of "the imminent destruction of evidence."[131] He noted that there is a particular sense of urgency to preserve BAC evidence in these cases because in most states, the severity of the penalty imposed for driving while impaired is dependent upon the driver's BAC.[132]

C. The Dissenting Opinion

In Justice Sotomayor's dissent, she argued that officers should be required to obtain a warrant before requesting a blood draw in cases where it is possible, such as in *Mitchell*.[133] She noted that the State of Wisconsin failed

125. *Id.* at 2537.

126. *Id.* at 2535.

127. *Id.* at 2538.

128. *Id.* at 2539.

129. *Id.*

130. Mitchell v. Wisconsin, 139 S. Ct. 2525, 2539 (2019) (Thomas, J., concurring); Missouri v. McNeely, 569 U.S. 141, 176 (2013); Birchfield v. North Dakota, 136 S. Ct. 2160, 2197 (2016).

131. *Mitchell*, 139 S. Ct. at 2540.

132. *Id.*

133. *Id.* at 2541 (Sotomayor, J., dissenting).

to even raise the exigency issues and argued that this should have resulted in the exigency issue being waived entirely.[134] Furthermore, the dissenting opinion pointed out that the Court declined to create a categorical exigency exception for cases where blood draws are necessary in *Schmerber* and *McNeely*.[135] Instead, the precedent established by those cases left open the possibility that the exigency rule might apply depending on the facts of each particular case.[136] Justice Sotomayor argued that unconscious drivers do not present an inherently unique medical risk justifying a categorical approach because drunk drivers who do not lose consciousness can also require hospital treatment.[137] She stated that instead of creating a new categorical rule for unconscious drivers, the Court should continue to resolve drunk driving exigency issues on a case-by-case basis.[138]

The dissent also noted that while the plurality was correct in not relying on Wisconsin's consent argument, the Court should have gone further and held that a state implied consent statute cannot create actual and informed consent as required by the Fourth Amendment.[139] Justice Sotomayor stated that the case should have been decided on those grounds alone.[140]

V. COMMENT

In the past, the Supreme Court has stated that "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society."[141] The exigent circumstances doctrine was based on the idea that, in rare circumstances, upon the balancing of interests between the right to privacy and the need for effective law enforcement, the need for officers to effectively do their jobs would require them to forgo the process of obtaining a warrant.[142] The State of Wisconsin expressly declined to rely on this exception to justify the blood draw.[143] As the Wisconsin Court of Appeals explained,

> In particular, this case is not susceptible to resolution on the ground of exigent circumstances. No testimony was received that would support the conclusion that exigent circumstances justified the warrantless blood draw. [Officer] Jaeger expressed agnosticism as to how long it

134. *Id.* at 2545–46.

135. *Id.* at 2544.

136. *Id.*

137. *Id.* at 2549.

138. *Id.* at 2544.

139. *Id.* at 2545.

140. *Id.*

141. Wolf v. People of the State of Colo., 338 U.S. 25, 27 (1949), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961).

142. *See* Johnson v. United States, 333 U.S. 10, 14–15 (1948).

143. State v. Mitchell, 914 N.W.2d 151, 155, *cert. granted*, 139 S. Ct. 915 (2019), and *vacated and remanded*, 139 S. Ct. 2525 (2019).

> would have taken to obtain a warrant, and he never once testified (or even implied) that there was no time to get a warrant. The State, which bears the burden to prove that exigent circumstances existed and justified the warrantless intrusion, conceded that this exception is inapplicable below, and it does the same before us.[144]

Justice Sotomayor argued in her dissent that this should have resulted in the exigency issue being waived entirely.[145] Even without a clear waiver, the Court here should have looked to the record of appeal, as well as to its own precedent, and easily determined that the exigent circumstances doctrine did not apply.

Instead, the Court here chose to ignore the arguments made – or rather not made – by the State on appeal, disregard its own precedent, and expand the exigent circumstances doctrine beyond its original purpose. The holding in this case has three major implications. First, the Court abandoned the case-by-case analysis for unconscious drunk driving suspects and created a categorical presumption of exigency in those cases. Second, the Court placed the burden of overcoming that presumption on the defendants, contradicting precedent placing such burden of proving exigency on the State. Third, the Court failed to clearly state whether implied consent statutes can create voluntary consent to a search, potentially allowing future courts to rule that it can.

A. Abandoning the Pure Case-by-Case Analysis

In prior decisions, the Supreme Court has expressly declined to allow for a *per se* exigency rule for BAC tests in all drunk driving cases, indicating an unwillingness to "depart from careful case-by-case assessment of exigency and adopt [a] categorical rule."[146] As Justice Sotomayor correctly argued in her dissent, this precedent should have resolved *Mitchell*.[147] She stated, "The lesson is straightforward: Unless there is too little time to do so, police officers must get a warrant before ordering a blood draw."[148] Similarly, in his partial concurrence in *McNeely*, Justice Roberts stated, "If there is time to secure a warrant before blood can be drawn, the police must seek one."[149] Such a rule is consistent with the entire spirit of the Fourth Amendment, as the Court has made clear before, noting that obtaining a search warrant "whenever

144. State v. Mitchell, No. 2015AP304-CR, 2017 WL 9803322, at *2 (Wis. Ct. App. May 17, 2017), *appeal decided*, 914 N.W.2d 151, *cert. granted*, 139 S. Ct. 915 (2019), and *vacated and remanded*, 139 S. Ct. 2525 (2019).

145. *Mitchell*, 139 S. Ct. at 2545–46 (Sotomayor, J., dissenting).

146. Missouri v. McNeely, 569 U.S. 141, 152 (2013); *see also* Birchfield v. North Dakota, 136 S. Ct. 2160, 2174 (2016).

147. *Mitchell*, 139 S. Ct. at 2544 (Sotomayor, J., dissenting).

148. *Id.* at 2544–45.

149. *McNeely*, 569 U.S. at 173 (Roberts, J., concurring in part).

reasonably practicable" is a "cardinal rule."[150] The holding here violates that cardinal rule. Instead, the Court held that when a driver is unconscious and police have probable cause to believe he or she is drunk, police may "almost always order a warrantless blood test to measure the driver's BAC without offending the Fourth Amendment."[151]

In the past, the Court has expressed disapproval of treating entire classes of cases in such a categorical manner.[152] In *Richards v. Wisconsin*, the Court dealt with an argument regarding the so-called "knock-and-announce" requirement.[153] This rule requires officers to announce their presence to the occupant of a premises before executing a search warrant, subject to certain exceptions.[154] The Wisconsin Supreme Court had held that drug searches constituted a categorical exception to the knock-and-announce rule because they posed an inherent danger of suspects being able to quickly destroy evidence before police could enter.[155] The United States Supreme Court rejected this ruling, holding that such blanket exceptions were inappropriate, and that each situation should be analyzed by the particular facts of the case.[156] There is no reason for blood draws taken from unconscious drivers to be treated any differently.

Surely there will be some situations where an unconscious driver presents an exigency that makes obtaining a warrant for a blood draw impracticable, as the plurality highlights with the extreme hypothetical it refers to in the opinion.[157] Unlike in *Mitchell*, there very well may be future cases where officers must handle obtaining BAC evidence from an unconscious driver on top of dealing with a dangerous accident. It would be perfectly appropriate in those particular situations for courts to find that blood could be drawn without obtaining a warrant under the exigent circumstances doctrine. The Supreme Court had already done so over fifty years before with their holding in *Schmerber*.[158] However, as the actual facts of *Mitchell* indicate, not all unconscious drivers inherently create such an exigency.[159]

The Court noted in *McNeely* that advances in technology have allowed for "more expeditious processing of warrant applications, particularly in contexts like drunk-driving investigations where the evidence offered to

150. Trupiano v. United States, 334 U.S. 699, 705 (1948), *overruled in part by* United States v. Rabinowitz, 339 U.S. 56 (1950).

151. *Mitchell*, 139 S. Ct. at 2539 (plurality opinion).

152. *See* Richards v. Wisconsin, 520 U.S. 385 (1997).

153. *Id.*

154. *Id.*

155. *Id.* at 394.

156. *Id.*

157. Mitchell v. Wisconsin, 139 S. Ct. 2525, 2538 (2019).

158. Schmerber v. California, 384 U.S. 757, 770–71 (1966).

159. *See* State v. Mitchell, No. 2015AP304-CR, 2017 WL 9803322, at *2 (Wis. Ct. App. May 17, 2017), *appeal decided*, 914 N.W.2d 151, *cert. granted*, 139 S. Ct. 915 (2019), and *vacated and remanded*, 139 S. Ct. 2525 (2019).

establish probable cause is simple."[160] As the Court noted, technological advances and processes such as standard-form warrant applications have helped streamline the warrant process for drunk-driving investigations.[161] As a result, judges are often able to issue warrants in five to fifteen minutes.[162] In contrast, the body generally eliminates alcohol from the blood stream at a rate of 0.015 per hour.[163] Additionally, unconsciousness is likely to occur at higher BAC levels.[164] Thus, unconscious drivers are likely to be higher above the legal limit when apprehended and remain above the legal limit for longer as a result, diminishing the urgency for a blood draw in such cases.[165]

It is clear that situations will occur where officers are perfectly able to obtain a warrant before ordering a blood draw from an unconscious driver. As Justice Sotomayor argued in her dissent, the Court here should have simply applied the precedent established by other drunk driving cases requiring courts to look to the particular facts of each case to see if an exigency exists.[166] Instead, the Court abandoned that fact-specific approach and created a blanket rule for all unconscious drivers.[167] While the Court stops short of agreeing with Justice Thomas and establishing the *per se* exigency for drivers suspected of drunk driving,[168] or even a *per se* exigency for all unconscious drivers, the decision seems to create a presumption of exigency for unconscious drivers and place the burden of overcoming that presumption on the drivers.[169]

B. Shifting the Burden

Traditionally, those seeking to rely on an exception to the warrant requirement have had the burden of showing the need for it.[170] In *Payton v. New York*, the Court held that "It is a 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable."[171] In *Welsh v. Wisconsin*, the Court stated that before the government may invade the sanctity of a home without a warrant, they face the burden of overcoming the presumption of unreasonableness.[172]

160. Missouri v. McNeely, 569 U.S. 141, 154 (2013) (majority opinion).

161. *Id.* at 154–55.

162. *Mitchell*, 139 S. Ct. at 2548 (Sotomayor, J., dissenting).

163. Keller, *supra* note 41, at 125.

164. *Mitchell*, 139 S. Ct. at 2549.

165. *Id.*

166. *Id.* at 2544; *see* Birchfield v. North Dakota, 136 S. Ct. 2160, 2174, (2016); Missouri v. McNeely, 569 U.S. 141, 165 (2013); Schmerber v. California, 384 U.S. 757, 770–71 (1966); *see also* Richards v. Wisconsin, 520 U.S. 385, 394 (1997).

167. *Mitchell*, 139 S. Ct. at 2539 (plurality opinion).

168. *Id.*

169. *See id.* at 2539.

170. Coolidge v. New Hampshire, 403 U.S. 443, 455 (1971), *holding modified by* Horton v. California, 496 U.S. 128 (1990).

171. Payton v. New York, 445 U.S. 573, 586 (1980).

172. Welsh v. Wisconsin, 466 U.S. 740, 750 (1984).

While intrusions into the body are substantially more invasive than intrusions into the home,[173] the Court here seems to flip that presumption by placing the burden on the defendant to show that a warrantless blood draw was unreasonable.[174] Under the plurality's rule, in order to overcome the presumption of exigency, a defendant must show that: (1) his or her blood would not have been drawn if police were not seeking BAC information; and (2) police could not have reasonably determined that a warrant application would interfere with other pressing duties.[175]

Only time will tell if the Court simply believes that this specific class of drunk driving cases calls for such a burden shift, or if this is the beginning of a movement by the Court to push back on the presumption that has been established in all Fourth Amendment cases by decades of precedent.[176] The fact that the Court was willing to place the burden on defendants in cases involving an intrusion into a person's body makes it fair to wonder how courts will treat less invasive searches in the future. Even if this burden shift is to be limited only to these specific instances, such a shift should still call for alarm. It is perhaps easy to disregard potential constitutional concerns stemming from these cases because drunk drivers are a fairly unsympathetic class. But one of the very purposes of the Constitution and Bill of Rights is to protect politically unpopular minorities.[177] If the Fourth Amendment is to protect citizens from all unreasonable searches and seizures by the government, then the government ought to face the burden of showing that a search is reasonable in all circumstances. Drunk driving cases should be no exception. An intrusion into a citizen's body by the State is an inherently invasive search, and such a search should be afforded the full protections of the Fourth Amendment.

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173. *See* Schmerber v. California, 384 U.S. 757, 767–68 (1966) ("Because we are dealing with intrusions into the human body rather than with state interferences with property relationships or private papers— 'houses, papers, and effects'—we write on a clean slate.").

174. *Mitchell*, 139 S. Ct. at 2539.

175. *Id.*

176. *See* Welsh v. Wisconsin, 466 U.S. 740, 750 (1984); Payton v. New York, 445 U.S. 573, 586 (1980); Coolidge v. New Hampshire, 403 U.S. 443, 455 (1971), *holding modified by* Horton v. California, 496 U.S. 128 (1990). .

177. *See* Gundy v. United States, 139 S. Ct. 2116, 2134 (2019) (Gorsuch, J., dissenting); The Federalist No. 51; W. Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943) ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."); Terrance Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162, 1164–65 n.6 (1977) ("The Constitution does not purport to protect the interests of minorities by conferring rights upon them alone. Its premise, rather, is that certain interests of individuals are to be immunized from governmental authority without regard to whether the individuals are members of the majority or of a minority.").

C. Questions Left Unanswered

Aside from the effect this case has on the exigent circumstances doctrine, this ruling also leaves the original question faced by the court unanswered.[178] Justice Sotomayor declared in her dissent she would hold that an implied consent statute can never create the "actual and informed consent that the Fourth Amendment requires."[179] However, the plurality never makes a clear ruling on the issue.[180] While the broad presumption of exigency carved out by the plurality would seem to indicate that this issue will rarely be pertinent in future cases, the decision expressly leaves open the possibility that some cases will not be settled by exigent circumstances.[181] The plurality should have taken Justice Sotomayor's approach and specifically held that implied consent statues can never justify a warrantless blood draw in such cases. As Justice Bradley argued in her dissenting opinion at the Supreme Court of Wisconsin, implied consent is distinct from actual consent, and allowing implied consent statutes to create a categorical *per se* exception to the Fourth Amendment warrant requirement is a clear deviation from the case-by-case "totality of the circumstances" approach established by precedent.[182] Additionally, such a decision would establish a dangerous precedent of allowing governments to statutorily limit constitutional rights.[183] The United States Supreme Court's failure to clearly reject the use of implied consent laws to justify warrantless blood draws leaves the door open for even further erosions of basic Fourth Amendment protections in the future.

VI. CONCLUSION

In *Mitchell v. Wisconsin*, the Supreme Court ruled that virtually all unconscious drivers suspected of driving under the influence are subject to warrantless blood draws under the exigent circumstances doctrine.[184] This ruling will allow officers to invade the bodily autonomy of unconscious persons without obtaining a warrant, even in situations where a warrant could have been obtained with little trouble. This decision ignores precedent, erroneously expands what is supposed to be a narrow exception to the Fourth Amendment warrant requirement, and wrongly places the burden on the defendant to show that the exception does not apply. Additionally, this decision fails to address the issue upon which the appeal was based. As a

178. *See* Mitchell v. Wisconsin, 139 S. Ct. 2525 (2019).

179. *Id.* at 2545.

180. *See id.* at 2525–39.

181. *Id.* at 2539.

182. State v. Mitchell, 914 N.W.2d 151, 172–75 (Bradley, J., dissenting), *cert. granted*, 139 S. Ct. 915 (2019), and *vacated and remanded*, 139 S. Ct. 2525 (2019); Schneckloth v. Bustamonte, 412 U.S. 218, 2047–48 (1973).

183. *See Mitchell*, 914 N.W.2d at 172–75.

184. *Mitchell*, 139 S. Ct. at 2531.

result, this decision erodes Fourth Amendment protections for those suspected of drunk driving and opens the door for further erosions in the future.